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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-57

EDWIN L. WIEGAND CORPORATION,

Petitioner,

—v.—

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	PAGE
Opinions of Courts Below	1
Grounds on Which Jurisdiction Is Invoked	2
Question Presented for Review	2
Constitutional and Rules Provisions Involved	3
Statement of the Case	5
Why Certiorari Should Be Granted	8
I. The decision of the Sixth Circuit directly conflicts with decisions of this Court	8
II. The issue presented here is of first impression	11
III. The decision of the Sixth Circuit results in uncertainty as to whether litigants could lose their right to a jury trial because of the latitude of Rule 42(b) and the requirements of Rule 52(a)	12
IV. The right to trial by jury is fundamental to our system of justice	14
APPENDIX A (Opinion of District Court in Principal Case)	15
APPENDIX B (Opinion of District Court on Cross-Claims)	21
APPENDIX C (Opinion of Sixth Circuit)	25
APPENDIX D (Colloquy Between Trial Court and Counsel)	26

AUTHORITIES

PAGE

Cases:

Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 .....8, 9, 10

Dimick v. *Schiedt*, 293 U.S. 474 14

Dairy Queen, Inc. v. *Wood*, 369 U.S. 469 .....8, 9, 10

Meeker v. *Ambassador Oil Co.*, 375 U.S. 160 10

Ross v. *Bernhard*, 396 U.S. 531 .....9, 10

Shubin v. *United States District Court*, 369 U.S. 660 .. 10

Thermo-Stitch, Inc. v. *Chemi-Cord Processing Corp.*, 294 F.2d 486 9

Constitutional Provisions:

United States Constitution
Seventh Amendment 3

Rules:

Federal Rules of Civil Procedure:

Rule 38(a) 3
Rule 38(b) 3
Rule 42(b) 4, 11, 12
Rule 52(a) 3, 4, 11, 12

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EDWIN L. WIEGAND CORPORATION,

Petitioner,

—v.—

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Edwin L. Wiegand Corporation, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit.

Opinions of Courts Below

1. The opinion of the District Court in the principal case is attached hereto as Appendix A.

2. The opinion of the District Court on the cross-claims is attached hereto as Appendix B.

3. The opinion of the Sixth Circuit is attached hereto as Appendix C.

Grounds on Which Jurisdiction Is Invoked

1. Summary judgment on Respondent's cross-claim against Petitioner in the District Court was entered on August 4, 1970.

2. The order denying Petitioner's motion for new trial on its cross-claim in the District Court was entered August 21, 1970.

3. The order and judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 12, 1971.

4. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

Question Presented for Review

In a product liability case in law and not in equity where:

1. The two defendants cross-claimed against each other; and

2. The facts as to liability to plaintiff and liability between the defendants *inter se* were admittedly in dispute; and

3. One of the defendants timely demanded a jury trial on the cross-claims, prior to trial of the principal case, and noted its jury demand on the record at the commencement of the trial of the principal case; and

4. Where the trial court at the last minute decided to try the principal case and the cross-claims separately; and

5. Upon trial of the principal case without a jury, the trial court, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, made detailed findings of fact adverse to petitioner,

could the trial court notwithstanding the jury demand and admitted factual disputes as to the cross-claims, subsequently grant summary judgment on one of the cross-claims on the ground that the cross-claimants are conclusively bound by the court's fact findings in the principal trial and thereby estopped from further litigation?

Constitutional and Rules Provisions Involved

1. The Seventh Amendment to the United States Constitution preserving the right to trial by jury reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law."

2. Rule 38(a) of the Federal Rules of Civil Procedure preserving the right to trial by jury reads as follows:

> "*Right Preserved.* The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

3. Rule 38(b) of the Federal Rules of Civil Procedure setting forth procedure for demanding a jury reads as follows:

"*Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

4. Rule 42(b) of the Federal Rules of Civil Procedure permitting separate trials of the cross-claims reads as follows:

"*Separate Trials.* The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claims, counterclaim, or third-party claim, or of any separate issue of or any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."

5. Rule 52(a) of the Federal Rules of Civil Procedure requiring a trial court sitting without a jury to make detailed findings of fact reads as follows:

"*Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous,

and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

Statement of the Case

This action arose out of a fire which started in or about a certain heater-air conditioning unit manufactured by Respondent, Westinghouse Electric Corportion ("WESTINGHOUSE"). Petitioner, Edwin L. Wiegand Corporation ("WIEGAND"), manufactured the heating element which was a component part of the subject WESTINGHOUSE heater-air conditioner unit.

Plaintiffs before the trial court were insurers who were the subrogees of the tenant and owners of the premises damaged by the fire.

Federal jursidiction was based on diversity of citizenship.

Plaintiffs sued WESTINGHOUSE and WIEGAND, jointly and severally, seeking recovery for the stipulated $247,276.33 total damages sustained as a result of the fire on two counts: for breach of warranty and for negligence. The complaint and amended complaint allege that the heater-air conditioning unit was defective, and the proximate cause of the fire.

WESTINGHOUSE cross-claimed against WIEGAND for indemnity and/or contribution, claiming that any liability of WESTINGHOUSE was caused by defective manufacture of the heating element supplied by WIEGAND and installed by WESTINGHOUSE as a component part.

WIEGAND cross-claimed back against WESTINGHOUSE for indemnity and/or contribution, claiming that WESTINGHOUSE was guilty of negligent design and repair of the subject heater-air conditioning unit.

WIEGAND filed a timely demand for jury trial on both cross-claims.

There was no jury demand for trial of the principal case against both WESTINGHOUSE and WIEGAND, jointly and severally.

At the beginning of the trial, counsel for WIEGAND indicated that WIEGAND had demanded a jury trial on the cross-claims. The trial court decided to dispose of the matter in two stages:

1. Try the principal case, the claim of the insurers of the tenant and owners, without a jury; and then

2. Deal with the cross-claims of WESTINGHOUSE and WIEGAND. (Colloquy between counsel, App. D.)

In a lengthy trial, factual and opinion testimony was inconsistent and conflicting. Both:

1. The trial court, in its findings of fact (App. A), and

2. WESTINGHOUSE, in its brief to the Sixth Circuit expressly acknowledged that a finder of fact could properly find either way on the cross-claims between WESTINGHOUSE and WIEGAND.

The trial court found that a defective weld in the WIEGAND heating element caused an electrical arcing of intense heat which ignited a filter and caused the fire (App. A). The trial court determined that both WESTINGHOUSE and WIEGAND were liable to Plaintiffs, jointly and severally, under Michigan law with WESTINGHOUSE liable on an implied warranty regardless of negligence, and WIEGAND liable on their implied warranty and because its negligence was the primary cause of the fire (App. A).

After judgment for Plaintiffs were entered against both defendants, WESTINGHOUSE paid the entire judgment amount to Plaintiffs which filed Satisfactions of Judgments and Assignments to WESTINGHOUSE of their cause of action against WIEGAND.

The trial court granted WESTINGHOUSE's motion for summary judgment against WIEGAND on its cross-claims, and denied WIEGAND's motion for a new trial. The trial court concluded that WIEGAND was not entitled to a jury trial on the cross-claims because the court's findings of facts in the principal case were conclusively binding on WIEGAND (App. B).

The Sixth Circuit Court of Appeals erroneously failed even to address itself to the issues involved issuing only a pro forma order of affirmance, without opinion (App. C).

Why Certiorari Should Be Granted

I.

The decision of the Sixth Circuit directly conflicts with decisions of this Court.

The following cases (1) were heard on certiorari and (2) reversed decisions of the Court of Appeals:

A. In *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500, the trial court determined to try the equitable issue submitted by plaintiff (prayer for injunction) first, even if this would necessarily dispose of defendant's legal claim and, by *res judicata,* eliminate the jury trial defendant had demanded on its counterclaim.

This Court held, Justices Harlan and Whittaker dissenting, that equitable claims could not be tried in advance of legal claims so as to deprive a party of its right to trial by jury. The court noted that, 359 U.S. 510-11,

> ". . . only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."

B. In *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469, the trial court determined that the legal issue of anti-trust violations was "incidental" to equitable aspects of the case (accounting sought by plaintiff) and dismissed defendant's jury demand. This Court, following and further defining *Beacon Theatres,* upheld defendant's right to a jury trial on the

legal issue of the claimed anti-trust violation. The Court said, 369 U.S. 470,

> "We granted certiorari because the action of the Court of Appeals seemed inconsistent with protections already clearly recognized for the important constitutional right to trial by jury in our previous decisions."

And in a footnote, 369 U.S. 473,

> ". . . As long as any legal cause is involved the jury rights it creates control. This is the teaching of *Beacon Theatres,* as we construe it." *Thermo-Stitch, Inc.* v. *Chemi-Cord Processing Corp.* (CA 5 Fla.), 294 F.2d 486, 491.

The mandate of *Dairy Queen* should be clearly dispositive of the case at bar, 369 U.S. 473,

> "*Beacon Theatres* requires that *any* legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." (Emphasis supplied.)

The issues of the cross-claims in the case before this Court (negligence and breach of warranty) are strictly legal in character. There is no complication of equitable, non-jury issues as there was in *Dairy Queen* and *Beacon Theatres.* WIEGAND timely demanded a jury when it answered WESTINGHOUSE's cross-claim and filed its own cross-claim prior to trial of the principal case.

C. *Ross* v. *Bernhard,* 396 U.S. 531, was a stockholders' derivative suit against directors of a corporation in which plaintiffs held stock. The Second Circuit would not permit

a jury trial because derivative actions were equitable in nature. This Court held that, 396 U.S. 532-3,

> ". . . the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury."

and at 396 U.S. 537-38,

> ". . . where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims."

In entering summary judgment for WESTINGHOUSE on the cross-claims, the trial court acted on its findings in the principal case. Despite the clear prohibition of *Ross* the trial court deprived WIEGAND of a jury trial because of a "court trial of a common issue." The Court of Appeals erroneously did not even consider this issue.

D. This Court has summarily reversed cases wherein *Beacon Theatres* and *Dairy Queen* have not been followed:

1. *Meeker* v. *Ambassador Oil Co.*, 375 U.S. 160.
2. *Shubin* v. *United States District Court*, 369 U.S. 660.

II.

The issue presented here is of first impression.

On July 1, 1966, Rule 42(b) of the Federal Rules of Civil Procedure was amended to add the following italicized language:

> "(b) *Separate Trials.* The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, *always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.*"

Under Rule 42 a trial court can properly resolve cross-claims of co-defendants *inter se* after it resolves the principal dispute against the Defendants. Under Rule 38 a cross-claimant can demand a jury on the cross-claims at any time prior to trial. Under Rule 52(a) the trial judge is required to submit detailed findings of fact.

Since Rule 42(b) was amended, this Court has not yet determined whether in a case with the defendants cross-claiming against each other, where (1) no jury has been demanded in the principal case but has been demanded on the cross-claims, and (2) the facts are admittedly in dispute, both as to liability to plaintiff, and as to liability between defendants *inter se*, the trial court can make such findings as would not only resolve but also foreclose any

subsequent trial by jury on the cross-claims, by summary judgment because the parties would be "estopped" from again contesting those facts.[1]

III.

The decision of the Sixth Circuit results in uncertainty as to whether litigants could lose their right to a jury trial because of the latitude of Rule 42(b) and the requirements of Rule 52(a).

Rule 42(b) gives a trial judge wide discretion to try issues or claims separately. Rule 52(a) requires the trial court to submit detailed findings of fact. If the trial judge determines to try a principal case separately, prior to trying cross-claims, are the cross-claimants then bound by the trial court's findings of fact despite that they have timely demanded a jury trial of the cross-claims on admittedly disputed facts?

If the answer is yes, then what happens to the litigant's right to trial by jury of disputed facts on its cross-claim pursuant to the jury demand properly filed prior to the first trial?

If the answer is yes, how is such result reconciled with the Seventh Amendment and with Rule 42(b) which expressly was amended to further safeguard the constitutional right to a jury trial?

---

[1] The trial court said,

"Defendant, WIEGAND, is bound by the findings of fact made on the issues already decided and will be estopped from any attempt to relitigate these issues which were necessarily raised at trial." See Appendix B.

There is great confusion as to the permissible discretion of the trial court in such circumstances. What *should* the trial court do? Petitioner submits that, by way of illustration only and not by limitation, the trial court could properly do one of two things:

1. Empanel a jury for the cross-claims only. Try the principal case and the cross-claims together. Instruct the jury to return a verdict on the cross-claim *only* if the trial court has found liability to the plaintiffs.

2. Try the principal case first. Upon finding any liability to plaintiffs for breach of warranty, then provide that further disposition as to liability between defendants on the cross-claims be determined by the jury as demanded by either of the cross-claimants.

IV.

The right to trial by jury is fundamental to our system of justice.

On previous occasions this Court has said that,

> "We granted certiorari, . . . because maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick* v. *Schiedt*, 293 U.S. 474, 486, 79 L.Ed. 603, 611, 55 Sup. Ct. 296, 95 ALR 1150, 36 NCCA 184."

Respectfully submitted,

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APPENDIX A

Opinion of District Court in Principal Case

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No: 29951

CONTINENTAL CASUALTY COMPANY OF ILLINOIS, Subrogee of WJRT, INC., OHIO FARMERS INSURANCE COMPANY, an Ohio corporation, and PHOENIX ASSURANCE COMPANY, a New York corporation, Subrogee of Charles and Larue Pemberton,

Plaintiffs,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, and EDWIN L. WIEGAND CORPORATION, jointly and severally,

Defendants.

OPINION

(Filed March 13, 1970)

This is a subrogation action by three plaintiff insurers against two defendants, Westinghouse Electric Corporation and Edwin L. Wiegand Corporation (hereinafter referred to as Westinghouse and Wiegand), to recover moneys paid by them as a result of a fire at WJRT-TV, a television station with related offices, located at Flint, Michigan.

The two-count complaint pleads breach of express and implied warranties and negligence of both defendants in furnishing WJRT-TV a heating-air conditioning unit manufactured by Westinghouse, containing a component heating element manufactured and supplied by Wiegand—which heating-air conditioning unit caused the fire and consequent losses complained of.

There are certain undisputed facts: Westinghouse manufactured and sold the combination heater-air conditioner unit, which was installed in a secretary's office in a newly constructed administrative wing at WJRT. (Fifteen other like units were installed in the building.) One of the component parts of the unit was a 3,000 wattspiral electric resistance heater, manufactured by Wiegand and sold to and installed by Westinghouse in the unit in question. The said unit was installed under the window in the room, which was used principally as a storeroom and which was not occupied by anyone until the week preceding the fire. The fire occurred at about 8:00 a.m. on Saturday, March 5, 1966. During that work week, i.e., Monday through Friday, March 4, the room was used by an accountant; Friday, he left the room at approximately 5:30 to 6:00 p.m.

It is stipulated that Charles and Larue Pemberton owned the building occupied by WJRT-TV as tenant; that plaintiffs are possessed of the subrogation rights; and, that the amounts paid by the plaintiffs are as follows:

Continental Casualty Company	$205,083.68
Ohio Farmers Insurance Company	$ 33,309.99
Phoneix Assurance Company	$ 8,882.66

It is further stipulated that if plaintiffs are entitled to recover, they are entitled to recover in the amounts stated.

The parties are agreed that there was arcing in the heating element manufactured by Wiegand. The dispute between the parties centers on what caused the fire and, by the same token, what caused the arcing.

It is the theory of the plaintiffs, joined by Westinghouse, that the heating element manufactured by Wiegand was defective when delivered to Westinghouse by reason of a defective or "marginal" weld of an end pin and the heating wire, or that there was present some foreign material in the area of the weld. They contend that because of the defective weld or foreign substance an internal arc developed at the weld, generating a tremendous amount of heat and energy within the sheath, causing a breakdown of the magnesium oxide insulation so that the arc reached the sheath, causing the expulsion of extremely hot gasses and molten metal particles, which then came into contact with the polyurethane filter, igniting the same and causing the ensuing fire damage.

It is the theory of the defendant Wiegand that Westinghouse was negligent in the design and manufacture of the unit in the following respects: that it improperly employed a flammable polyurethane filter; that it utilized flammable ABS plastic in its grilles; that the air flow over the thermostatic sensing bulb was restricted; that the chamber of the unit was improperly designed; and, that the over-temperature limit switch was improperly located upstream of the heating element. From these premises Wiegand reasons that the fire originated external to the heating element; that the limit switch was defective and did not work, as a result of which intense heat was generated causing the arcing; and, that the arcing did not occur at the weld.

There was considerable dispute as to whether the drapes, which could be drawn across in front of the unit, were in a closed position. Under the evidence we conclude that they were open at the time of the fire. As for the limit switch, we conclude that it was in working order, especially in view of the fact that months later, it responded to tests at Chromalox Laboratories, albeit at a higher calibration than would have been normal. If an external fire had caused the heating element to rupture, and we speak now of a buildup of some 1600 degrees, there would have been severe damage evident in the control panel. There was, however, no damage inside the control panel, located immediately to the left of the heating chamber; the paper diagram of the wiring circuitry is intact, with a slight browning along the right side thereof; there is no damage to the wiring in the control area; and, there is no evidence of melting or burning of bakelite parts, or of the aluminum face plate.

The x-rays of the cold pin and the heating wire near the rupture or eruption point indicate that a part of the weld portion of the heating wire is missing. With regard to this weld, defendant Wiegand's proofs were to the effect that the heating wire and the cold pin were brought together by a spot weld. This part of the manufacturing process was performed manually by an operator working on a normal production schedule of 400 welds per hour. Only one out of each hundred heating elements was subjected to a pull test.

The probabilities are, on the evidence before us, that the spot weld, connecting the heating wire to the cold pin, was defective on the unit in question, and we so find. We further find that because of the defective weld an arcing developed inside the sheath, leading in turn to a rupture

of the sheath and the expulsion, at high velocity, of particles of molten metals, hot magnesium oxide and gases which, coming into contact with the polyurethane filter and the plastic grille, caused them to burn, setting fire to the drapes and, by progression, the other material in the room and building.

On the evidence we hold that the conduct of Wiegand was the primary and efficient cause of the injury, i.e. that it was the sole, primary and proximate cause of the fire.

With respect to Westinghouse, we hold that it was its duty to use due care in constructing the unit and to see to it that it was properly equipped so that it could safely be used for its intended purpose and would not be a menace to those who used it. While we hold that the defect in the heating element supplied by Wiegand was not such as to have been discoverable by the exercise of due care by Westinghouse and that, therefore, its failure to discover the defect was not negligence, we conclude, under the authority of the leading Michigan case on the subject, *Piercefield* v. *Remington Arms Co.*, 375 Mich. 85, that Westinghouse is liable to the plaintiffs for breach of implied warranty of the unit of its fitness for its intended purpose and use.

Under *Piercefield* the burden is upon the plaintiffs in a case like this to "prove (a) the defect of manufacture upon which he relies, and (b) injury or damage caused by or resulting from such defect." In *Piercefield* the Court cited *Picker X-Ray Corp.* v. *General Motors Corp.*, 185 A.2d 919. We quote from that case what we consider applicable here:

> "* * * Implied warranty recovery is based upon two factors: (a) The product or article in question has been transferred from the manufacturer's possession

while in a 'defective' state, more specifically, the product fails either to be 'reasonably fit for the particular purpose intended' or of 'merchantable quality', as these two terms, separate but often overlapping, are defined by the law; and (b) as a result of being 'defective', the product causes personal injury or property damage."

We consider Michigan, in *Piercefield,* to have adopted the strict tort doctrine under the guise of the implied warranty theory. See Wayne Law Review, Vol. 15, page 1558. We hold that the plaintiffs have carried the burden of proof on the claim of implied warranty as to each defendant and on the claim of negligence as to the defendant Wiegand.

Under the above findings of fact and conclusions of law we hold that plaintiffs are entitled to recover from both defendants in the amounts stipulated, together with interest at the rate of 5% per annum from May 18, 1967 to the date of entry of judgment.

This resolves the issues between the plaintiffs and the defendants. There remain the cross-claims of the defendants. These will be considered and resolved upon motions or trial as may be found appropriate.

Dated: March 13, 1970.

STEPHEN J. ROTH
United States District Judge

APPENDIX B

Opinion of District Court on Cross-Claims

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONTINENTAL CASUALTY COMPANY OF ILLINOIS, Subrogee of WJRT, INC., OHIO FARMERS INSURANCE COMPANY, an Ohio corporation, and PHOENIX ASSURANCE COMPANY, a New York corporation, Subrogee of Charles and Larue Pemberton,

Plaintiffs,

—v.—

WESTINGHOUSE ELECTRIC CORPORATION, and EDWIN L. WIEGAND CORPORATION, jointly and severally,

Defendants.

RULING ON DEFENDANT WESTINGHOUSE'S MOTION FOR A SUMMARY JUDGMENT ON ITS CROSS-CLAIM AND ON DEFENDANT WEIGAND'S MOTION FOR A NEW TRIAL OR TO AMEND THE FINDINGS OF THE COURT

(Filed July 18, 1970)

This is a subrogation action by three plaintiff insurers against two defendants, Westinghouse Electric Corporation and Edwin L. Weigand Corporation (hereinafter referred to as Westinghouse and Weigand), to recover moneys paid by them as a result of a fire at WJRT-TV,

a television station with related offices, located in Flint, Michigan. The complaint alleged breach of warranty and negligence on behalf of each defendant in furnishing the TV station with a heating-air conditioning unit manufactured by Westinghouse, containing a component heating element manufactured and supplied by Weigand—which heating-air conditioning unit caused the fire and consequent losses complained of.

On March 13, 1970 this court entered its opinion containing certain findings of facts on each of the charges against each defendant and holding that on the evidence "the conduct of Weigand was the primary and efficient cause of the injury, i.e. that it was the sole, primary, and proximate cause of the fire," at p. 5, and "the plaintiffs have carried the burden of proof on the claim of implied warranty as to each defendant and on the claim of negligence as to the defendant Weigand," at p. 6. The court then stated that "[t]his resolves the issues between the plaintiffs and the defendants. There remain the cross-claims of the defendants. These will be considered and resolved upon motions or trial as may be found appropriate," at p. 6.

Defendant Westinghouse now moves for a summary judgment on its cross-claim against Wiegand. Defendant Weigand has filed a motion for new trial or to amend the findings of the court.

At the beginning of the trial it was stated upon the record that the principal case would be tried, and if necessary, the cross-claims would be subsequently tried. The court stated in its opinion that the cross-claims would be considered and resolved upon motions or trial as might be found appropriate. Defendant Weigand's motion for a new trial or to amend the findings of the court is based on allegations that the court should not have found any facts relating to the

issues in the cross-claims and that it ignored the testimony of some of Weigand's witnesses. In trying the issues in this case it was necessary for the court to make certain specific findings of fact relative to all of the charges in plaintiffs' complaint. It mattered not that these findings might effect the outcome of the cross-claim brought by both defendants against one another. Defendant Weigand is bound by the findings of fact made on the issues already decided and will be estopped from any attempt to relitigate those issues which were necessarily raised at trial. See *Ward* v. *Flex-O-Tube Co.,* 194 F.2d 500 (6th Cir. 1952).

> On the question whether parties are bound by a judgment, the formal arrangement of parties on the record is unimportant, so that if co-parties on the record were, in fact, adversaries on an issue, and the issue was actually litigated, and they had full opportunity to contest it with each other; either on pleadings between themselves and the plaintiff, or on cross-pleadings between themselves, co-parties are concluded by adjudication of that issue in a subsequent controversy between each other. *Fidelity & Casualty Co. of New York* v. *Federal Express,* 136 F.2d 35 (6th Cir. 1943).

Nor will defendant Weigand's charges that the court ignored the testimony of some of its witnesses justify granting a new trial. As stated in (a) of Fed. R. Civ. P. 52 "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Although defendant Weigand here brings his motion under (b) of Rule 52 it is not sufficient to attack the court's reliance on demeanor testimony to merely show that the court did not subscribe to the moving parties' theories and gave more weight to the testimony of other witnesses. The findings of

the court are sufficiently definite as to each issue raised in the complaint to substantiate the general conclusions of the court as to negligence and breach of warranty. See generally, *NLRB* v. *Dinion Coil Co.*, 201 F.2d 484 (2d Cir. 1952) on demeanor evidence, and *Filter* v. *Mohr*, 275 Mich. 230 (1936) on the weight to be given to physical facts.

The basic principle of the right to indemnity was also stated in the *Fidelity & Casualty of New York* v. *Federal Express* case, *supra:*

> It is the general rule that whenever the wrongful act of one person results in liability being imposed on another, the latter may have indemnity from the person actually guilty of the wrong. 136 F.2d 35, at 40.

Thus where the assembler is liable to plaintiff solely because of failure to discover a defect, and here that defect was undiscoverable making Westinghouse guilty of breach of warranty of fitness for a particular purpose rather than of negligence, he will be entitled to indemnity from the maker of the defective part. *Tromza* v. *Tecumseh Prods. Co.*, 378 F.2d 601 (3d Cir. 1957). See also Frumer & Friedman, 3 Products Liability §44.02; *Husted* v. *Consumers Power Co.*, 376 Mich. 41 (1965); and *Indemnity Insurance Co. of North America* v. *Otis Elevator Co.*, 315 Mich. 393 (1946).

For the reasons stated above defendant Weigand's motion for a new trial or to amend the findings of the court is hereby DENIED and defendant Westinghouse's motion for a summary judgment on its cross-claim against Weigand is hereby GRANTED.

Appropriate orders may be submitted.

STEPHEN J. ROTH
United States District Judge

APPENDIX C

Opinion of the Sixth Circuit

No. 20,831

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CONTINENTAL CASUALTY COMPANY OF ILLINOIS,

Plaintiff,

EDWIN L. WIEGAND CORPORATION,

Defendant-Appellant,

—v.—

WESTINGHOUSE ELECTRIC CORPORATION,

Defendant-Appellee.

Before:

WEICK, CELEBREZZE and BROOKS,

Circuit Judges.

ORDER

(Filed April 12, 1971)

This appeal is from the granting of a motion for summary judgment. Upon consideration of the record, the briefs of the parties and the oral arguments of counsel, it is concluded that the District Court's resolution of the issues is correct and that no error intervened in the proceeding.

It is therefore ORDERED that the judgment of the District Court is affirmed for the reasons set forth in the memorandum of Judge Stephen J. Roth.

Entered by order of the Court

CARL W. REUSS

Clerk

APPENDIX D

Colloquy Between Trial Court and Counsel

—60a—

[3]*

Detroit, Michigan
Tuesday, October 28, 1969
Morning Session

The Clerk: 29951. Continental Casualty Company of Illinois, Subrogee of WJRT, Inc., et al., versus Westinghouse Electric Corporation and Edwin L. Wiegand Corporation.

The Court: Are the parties ready?

Mr. Kohl: Defendant Westinghouse is ready.

Mr. Doelle: Defendant Wiegand is ready but I find there has been some confusion about my demand for jury on my cross-claim against Westinghouse and I would like to insist upon a jury on the cross-claim. I have no objection to your Honor trying the other matter but I would like a jury on the cross-claim.

The Court: Mr. Kohl?

Mr. Kohl: In reply I would like to say, your Honor, in the first place there is no basis whatsoever for the filing of the cross-claim which was done within a matter of the last several days.

Mr. Doelle: Over six I think to be exact.

Mr. Kohl: Without benefit of order, without a semblance of permission and the cross-claim and jury demand attached thereto I submit [4] to the Court are a complete nullity in this case.

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* Figures in brackets are page numbers of typewritten transcript of the trial proceedings herein.

Mr. Doelle: There is no requirement of an order on a crossclaim. There was none when Westinghouse filed one against me, your Honor.

—61a—

Mr. Kohl: I am afraid that is not true and the record and court file will reflect what I have said.

The Court: I was under the understanding, perhaps misunderstanding, that no jury trial would be asked for by any of the parties.

Mr. Kohl: No jury.

The Court: And I have notes on the April 29, 1968 gathering of the clan in Flint.

Mr. Doelle: That is correct.

The Court: (Continuing) In which I thought I was told nobody would ask for a trial by jury and my notes show Mr. Davies was there, Mr. Kohl was there and Mr. Doelle was there.

Mr. Doelle: I think that is true. May I say I did not until I had this last pre-trial confrontation with Mr. Kohl when he indulged in so much vitriol in your Honor's chambers against Wiegand I did not think that a jury was essential but I do feel after listening to him in there [5] that I would like to have a jury determine the merits and demerits of his argument and I do think they should be presented to a jury. This was filed on October 6, and under the circumstances I think Mr. Kohl and myself might more properly be evaluated by a jury in our respective claims. That is my feeling. If he had been quite lacking in emotion that day before your Honor I might not have demanded a jury but I thought, well, if this is a sample of Mr. Kohl I better have a jury look at it.

The Court: We have some jurors who have been called to service before some of the other judges and I would

think sometime this morning yet we can gather enough to serve you.

—62a—

Have the exhibits all been marked?

Mr. Davies: Many of the exhibits have been marked, not all of them. I don't have them all here yet.

The Court: What I am trying to see is what we can accomplish while we are waiting for a jury. I would like any suggestions that you may have along that line. I would like to do something. I have some other matters I can attend to in chambers but I don't like to see you fellows sitting idly by.

Mr. Moesta: Unless we can make some effort to see if we can agree on the damages which would eliminate substantial trial time. [6] All these losses were paid by insurers and we presented Mr. Kohl—I think Mr. Kohl has agreed to stipulate to damages, Mr. Doelle hasn't. We furnished him with copies this morning and he was going to see whether he could stipulate and we might pursue that aspect of it.

The Court: What do you think of that, Mr. Doelle, do you think we can make some time?

Mr. Doelle: I think probably we can. I just had them presented to me here and I haven't had a chance to look them over but I should be happy to and I think we might do something in that connection.

The Court: Are there other matters which could be useful in shortening the time of trial that you might stipulate to? As I understand the crux of the entire matter is the cause of the fire, isn't it?

Mr. Doelle: That's right. That is what we are really trying. I don't know what you have in the—

The Court: If there are matters that you can stipulate

—63a—

to without in any way giving up your version of the causation I would hope you would, between now and the time we get a jury in here. I would think we can get one in here this morning yet. I will have to wait until they select jurors in a couple of the other courts before I have some leftovers, which is the best I can serve you this morning.

[7] Mr. Doelle: That's all right.

Mr. Kohl: May I be heard?

The Court: Yes.

Mr. Kohl: May it please the Court, I say this very seriously on behalf of Defendant Westinghouse. It is my position that this case was to be tried by the Court, non-jury. We have had a number of hearings on this case before this Court. There has been nothing new, different or surprising. We all have been in the courtroom and before the Court on many occasions, every lawyer that is involved in this case and it is my understanding very definitely that in the various hearings that have been conducted before your Honor that there was complete agreement insofar as the conduct of this trial is concerned, insofar as trial by court or jury is concerned, and as I say it is my position on behalf of my client that this cause should be tried by the Court.

We discussed it in great detail and it was agreed upon by all counsel that this was the type of cause that if tried by the Court would take considerably less time to try than if tried to a jury. It was discussed with the Court. The Court, I recall clearly, asked every lawyer, each of us as we appeared before your Honor if there was to be a jury trial and there was [8] no equivocation, no "maybe"

—64a—

or "possibly" or "we will wait and see." There was nothing of that nature and I speak only for myself when I say this but my approach to a trial, non-jury, depending on the case, is not necessarily the same as might be the situation before a jury.

I think it was discussed and agreed in accordance with the Court's comments of a few moments ago that actually when you reduce this case down the questions involved are basic and could be resolved with a maximum of dispatch. I do not know to what extent plaintiffs have been influenced by the belief that we were to try this case non-jury, but I have to believe to some degree, and I have planned to try my case accordingly and I respectfully suggest to the Court that there is no timely demand for a jury trial and that in fact this is the type of case where the basic issues are clear and distinct and that for the reasons I have stated to the Court, without going into further detail, I respectfully submit to the Court that this case should be tried non-jury.

Mr. Doelle: Your Honor, on October 6, Mr. Kohl received my crossclaim and demand for jury. He was aware of it at that time. If he wished to come in and move to strike the demand that should have been done prior to today. He had that opportunity. I say again that if Mr. Kohl had conducted himself in chambers at the last pre-trial in a [9] temperate manner as he did when he was addressing your Honor here, I would have had no suggestion—

The Court: He couldn't very well do that on that occasion if you remember, because he had a temperature.

Mr. Doelle: I think that is right; he had a higher temperature at that time. He was suffering from the flu as I remember it. But I got back to the office and I thought,

—65a—

"Well, if he feels so strongly against Wiegand as he expressed himself in chambers, I do feel that a jury should weigh and evaluate this claim of his" and I would like to have them do it.

Mr. Kohl: I say to the Court that an order entered by this Court on a preliminary pre-trial order dated April 30, 1968, on page 2, item (c) Amendments to Pleadings by application for leave extended to September 9, 1968.

Mr. Doelle: That is correct. There isn't any question about it.

The Court: Well, let's not belabor the point. It's a discretionary matter and Mr. Doelle wants a jury and he will have a jury, I guess.

Mr. Moesta: Do I understand that is a jury just to try the issue on his crossbill?

The Court: Yes.

[10] Mr. Moesta: We are not prepared to try our case to a jury and, Mr. Kohl, I agree with that, we prepare differently when we are doing to try it to a jury.

The Court: That brings me back to you, Mr. Kohl. Do I understand your alternative to be a request for a continuance or not?

Mr. Kohl: No, it's not, your Honor.

The Court: Why don't you get together in the jury room which presently is not occupied and see what matters of stipulation you can enter and meanwhile we will see how many jurors we can round up.

—66a—

We will be in recess until that time.

(A recess was taken until 2:00 P.M.)

The Court: After conference with counsel this morning before we recessed, the Court is of the opinion that the case in main should be tried and the matter of the cross-claims will either be disposed of by the decision in the case in main or in any event if it requires further proceedings will be tried separately.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-57

EDWIN L. WIEGAND CORPORATION,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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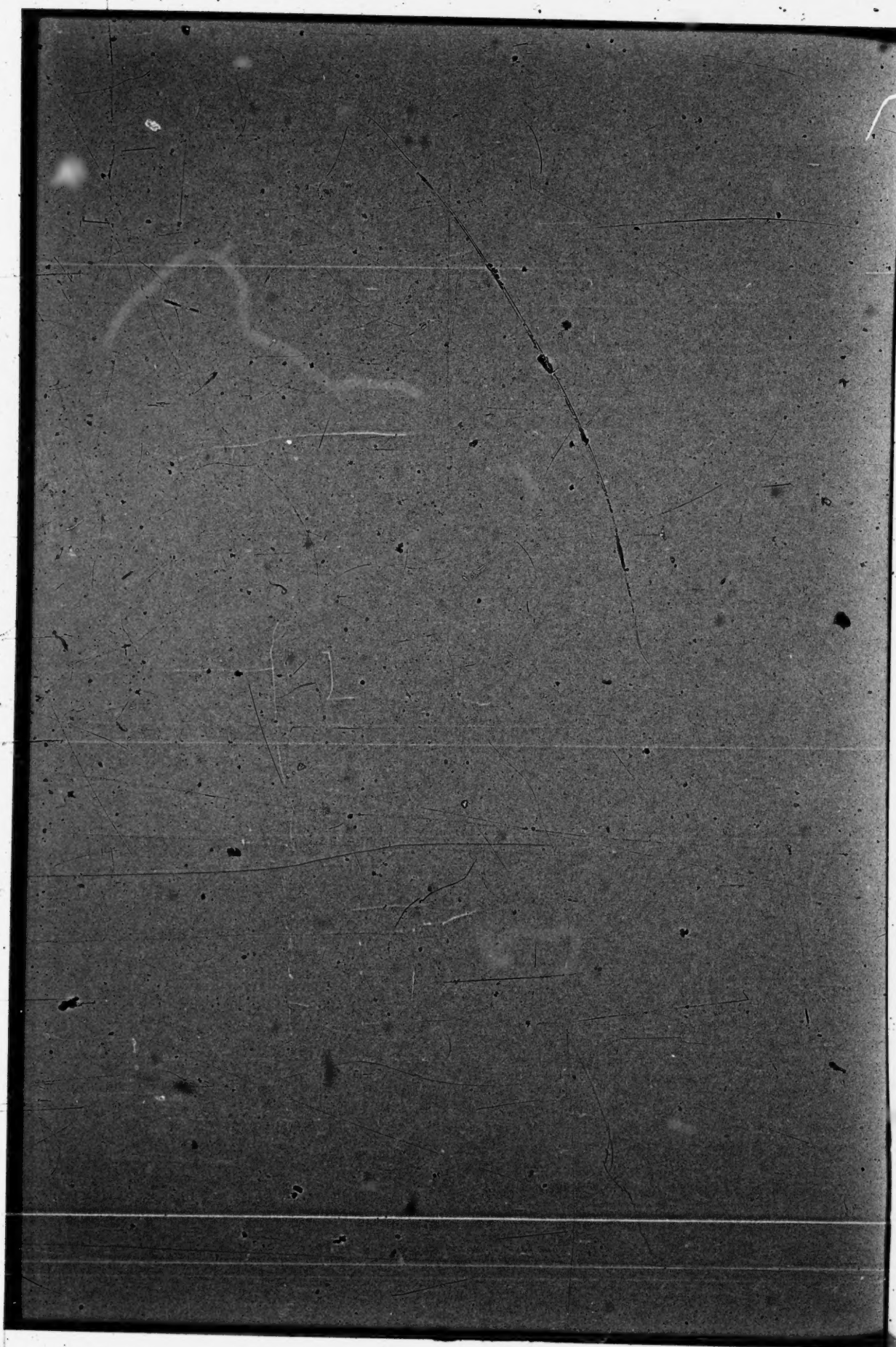

TABLE OF CONTENTS

	Page
Opinions of the Court Below	2
Grounds on Which Jurisdiction is Involved	3
Counter-Statement of Question Presented for Review	3
Constitutional and Rules Provisions Involved	3
Counter-Statement of the Case	4
Why Certiorari Should not be Granted	5
I. The Decision of the Sixth Circuit does not Conflict with Decisions of this Court	5
II. There is no Issue of First Impression presented Herein as Contended by Petitioner	7
III. The Decision of the Sixth Circuit Herein Presents no Uncertainty or Ambiguity Under Rules 42(b) and 52(a)	9
IV. The Right to Trial by Jury	10

INDEX TO AUTHORITIES CITED

Cases:

Beacon Theatres Inc. v. Westover, 359 U.S. 500	5, 6
Dairy Queen, Inc. v. Wood, 369 U.S. 473	5, 6
Meeker v. Ambassador Oil Co., 375 U.S. 160	5
Ross v. Bernhard, 396 U.S. 531	5
Shubin v. United States District Court, 369 U.S. 660	5

Federal Rules of Civil Procedure:

42(b)	9
52(a)	7, 9

IN THE

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, Westinghouse Electric Corporation, responds to the within Petition for Writ of Certiorari and urges that said Petition be denied.

OPINIONS OF THE COURT BELOW

The trial court in the principal cause held "that the conduct of Wiegand was the primary and efficient cause of the injury, i.e., that it was the sole, primary and proximate cause of the fire" and that Westinghouse was liable to plaintiffs for breach of implied warranty, only (pp. 19-20, Petitioner's Brief, Appendix A). The trial court then said that the cross-claims of the defendants would be "resolved upon motions or trial as may be found appropriate" (p. 20, Petitioner's Brief, Appendix A).

In resolving the cross-claims between the defendants for indemnity upon the Respondent's motion for summary judgment based on the Court's ruling in the principal cause, the trial Court granted Respondent's Motion, entered judgment over against Petitioner, and denied Petitioner's motions for new trial or to amend the findings of the Court (Appendix B, Petitioner's Brief). The trial Court held that the fundamental issues of liability of the two defendants had *to be* and were resolved in the principal cause, in which Petitioner had not demanded a jury, and Petitioner would not be allowed to relitigate them in a separate action on the cross-claims (p. 23, Appendix B, Brief of Petitioner). The Court having found the cause of the loss to have been Wiegand's component, and Westinghouse vicariously liable therefor, judgment over was granted to Respondent (p. 24, Appendix B, Brief of Petitioner).

The Sixth Circuit Court of Appeals affirmed "for the reasons set forth in the memorandum" of the trial court (p. 25, Appendix C, Brief of Petitioner).

GROUNDS ON WHICH JURISDICTION IS INVOKED

Respondent does not contest the jurisdictional statements in Petitioner's Brief, save to urge that certiorari not be granted herein.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Is it error for a trial judge in a non-jury product liability case to make findings of fact in a principal case in trial and to subsequently grant summary judgment based upon such findings of fact to one of two co-defendants who were actual adverse litigants in the principal trial notwithstanding a demand made by the defendant manufacturer of a component part of the product in question for jury trial as to cross-claims between the co-defendants, one of whom is the manufacturer of the finished product and one of whom is the manufacturer of a component part?

CONSTITUTIONAL AND RULES PROVISIONS INVOLVED

Respondent accepts the statement of Constitutional and Rules Provisions Involved as set forth by Petitioner (pp. 3-5, Petitioner's Brief).

COUNTER-STATEMENT OF THE CASE

Petitioner, manufacturer of a component part, and Respondent, manufacturer of the completed unit into which said component was incorporated, were co-defendants in the trial Court. Plaintiffs there sued the co-defendants for a fire loss allegedly caused by overheating inside a Westinghouse air conditioning unit. No jury demand was made by any party in the principal case.

However, Respondent cross-claimed against Petitioner for indemnity and/or contribution, and Petitioner cross-claimed back for indemnity only. It is important to note that Wiegand's cross-claim was for indemnity only, *not* for indemnity and/or contribution as stated by Petitioner at page 6 of Petitioner's Brief. (See pp. 27a-29a, Joint Appendix in the Sixth Circuit Court of Appeals.) Petitioner did demand a jury on the cross-claim only.

The cause proceeded to trial, non-jury, with the trial judge stating on the record:

> "After conference with counsel this morning before we recessed, the Court is of the opinion that the case in main should be tried and the matter of the cross-claims will either be disposed of by the decision in the case in main or in any event if it requires further proceedings will be tried separately." (p. 32, Appendix D, Brief of Petitioner)

Proceeding to trial, the trial Court found in its findings of fact that the sole cause of the fire was a defect in the heating element manufactured by Petitioner. Petitioner and Respondent were held jointly and severally liable, Petitioner for *negligent manufacture* and breach of implied warranty and Respondent vicariously liable for Peti-

tioner's defective element through breach of implied warranty.

Respondent moved for summary judgment over on its cross-claim for indemnity and said motion was granted for the reasons outlined above and contained in Appendix A, Brief of Petitioner. The trial Court, in effect, held that since Respondent was only vicariously liable to plaintiffs for Wiegand's fault, Respondent was entitled to indemnity as a matter of law and without the necessity for a further trial to determine facts already necessarily adjudicated in the principal action.

On appeal by Petitioner, the Court of Appeals for the Sixth Circuit affirmed the trial judge's opinion without discussion.

Petitioner now seeks a writ of certiorari from this Court to review the Sixth Circuit affirmance.

WHY CERTIORARI SHOULD NOT BE GRANTED

I.

The decision of the Sixth Circuit does not conflict with decisions of this Court.

Respondent respectfully submits that all cases submitted by Petitioner in support of its position that there is a conflict in the result herein with cases decided by this Court are entirely inapposite and completely distinguishable on their essential facts.

Beacon Theatres Inc. v. Westover, 359 U.S. 500; *Dairy Queen, Inc. v. Wood,* 369 U.S. 473, *Ross v. Bernhard,* 396 U.S. 531, *Meeker v. Ambassador Oil Co.,* 375 U.S. 160, and *Shubin v. United States District Court,* 369 U.S. 660, all

involve complex legal and equitable claims and causes of action not at all present here. *Beacon Theatres* and *Dairy Queen* present unique anti-trust questions not present here.

On the other hand, none of the cases cited present the facts critical herein:

1. Two separate legal actions, with a jury demand as to one only;
2. A trial by jury demand upon an indemnity action by a tortfeasor barred by law from recovering indemnity;
3. A cross-claim for indemnity by a defendant who cannot be liable vicariously, but who, if liable at all, must be a tortfeasor;
4. And a non-jury action in which the Court must, and in fact did, make specific findings of fact and law as between actually adverse parties in order to hold either of them liable.

The fact is, there is not even the most remote connection between the case at bar and the cases cited by Petitioner in its Brief herein.

Accordingly, Respondent respectfully submits that a grant of certiorari cannot be predicated upon such a fabricated "conflict" with decisions of this Court.

II.

There is no issue of first impression presented herein as contended by Petitioner

Petitioner seeks to set up a straw man and then to demolish him. There simply is no issue of a jury trial right in the case at bar.

We believe we are properly mindful of the cherished right to trial by jury. But, the fact is, that is a "straw man" in the context of the case at bar. Petitioner, very simply, elected to attempt to assert its defenses in the principal case to the Court and to then assert the same claims and defenses against its co-defendant, relitigate them if necessary, and, thereby, be in a position to pick the best of both worlds.

That this is so, we submit, is clearly shown by the following:

A. The trial court patently had to try the principal case (in which no jury was sought) first; otherwise, there would be no controversy before the Court between the two defendants for there would have been no liability;

B. The trial court, in the principal action, was plainly required to make critical findings of fact in order to find any liability at all to the plaintiffs and to assign that liability among the co-defendants upon the basis of vicarious liability (Respondent) and for negligent manufacture (Wiegand); otherwise both defendants would have had reversible error in their favor for failure to satisfy Rule 52(a) or the applicable substantive law of product liability.

C. Having failed to demand a jury trial in the principay action, and having actually occupied an adverse position to Respondent on those very issues necessarily critical as between the co-defendants, Petitioner could hardly then be heard to demand an opportunity to re-litigate the same issues, before a jury, in hopes of a different result.

That there is no legitimate, let alone first-impression, issue presented here, furthermore, is seen at once by examination of the matter as to which a jury was demanded. Petitioner demanded a jury on its cross-claim against Respondent. That cross-claim was for *indemnity only*, not for indemnity or contribution. (See cross-claim of Wiegand, dated October 6, 1969, pp. 27a-29a, Joint Appendix in the Court of Appeals.)

There is simply no way in which Petitioner, the manufacturer of a component part, could have indemnity against Respondent, the manufacturer of the completed unit. Respondent can and did claim indemnity from Petitioner where Respondent's liability rests on mere breach of warranty, or theoretically, even for negligent failure to detect a defect. Petitioner, on the other hand, cannot be liable on a vicarious basis. It can only be liable if it manufactured a defective heating element; and if it did manufacture a defective heating element, it is at best a joint tortfeasor (in this case, based upon the findings of fact, the sole tortfeasor) and it is barred from indemnity. Hence, there is no way under the facts of this case in which Petitioner would ever be entitled to indemnity from Westinghouse. Consequently, Petitioner's cross-claim for indemnity is completely spurious and can hardly form the basis for review through certiorari by this Court.

III.

The decision of the Sixth Circuit herein presents no uncertainty or ambiguity under Rules 42(b) and 52(a).

Respondent adopts by reference their discussion immediately above in response to Petitioner's third argument. Certainly even if the validity of the questions raised by Petitioner as to the workings of Rules 42(b) and 52(a) be conceded *ex arguendo,* this cause, presenting as it does a spurious cross-claim in any event, is not the context in which to consider them. However, interesting those questions might be, the simple fact is that at no time do they actually arise herein because under no circumstances could Petitioner have even had a legitimate cause of action for indemnity in this case. Accordingly, the questions are moot points from the outset in this litigation.

Quite beyond that fact, however, is the fact that herein it was obviously necessary for the trial judge to proceed as he did: determine the principal case with findings of fact, as both defendants requested, non-jury; and then proceed to a jury trial *if* the findings in the principal case warranted. That is precisely what he was requested by *both* defendants to do and precisely what he did do.

Petitioner's own illustrations of available alternatives (at p. 13, Petitioner's Brief) are illustrative of our point. Petitioner's Illustration #1 is a deficient alternative because the trial judge could not find liability to the plaintiffs unless he made supporting findings of fact to sustain it. Obviously he cannot then pretend he has made no findings and invite the jury to reconsider the same questions as if he hadn't already done so. Illustration #2 suffers the same deficiency, only more obviously requires that the

trial judge *not* make adequate findings to support his verdict.

Thus, under the circumstances of this case, and with a jury demand only as to a cross-claim for indemnity only, we submit the trial judge did exactly what he should have done and what the law requires him to do.

IV.

The Right to Trial by Jury.

As we have said above, we believe we are properly mindful of the sacred right to trial by jury. We have here, however, no case of that constitutional question. We have, instead, a defendant trying to pick the best of both the jury and the non-jury worlds.

The genius of our system of law lies in its ability to coalesce constitutional liberty with orderly due process according to law. That objective has been well-served, we believe, in the case at bar. That the end result was other than Petitioner desired does not give foundation to do otherwise. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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